OFFICE OF THE DEPUTY COMMISSIONER - LEGAL MATTERS

LEGAL BUREAU BULLETIN

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I. SUBJECT: CRIMINAL DISCOVERY

A. Overview

- On January 1, 2020, the new laws governing discovery in criminal cases take effect.
- All discovery must be turned over to the defense within 15 days from arraignment. That means officers must get all discovery to the prosecutor *immediately* after an arrest so the prosecutor can review it, redact it and apply for Protective Orders before turning it over to the defense.
- The scope of discoverable information has been greatly expanded to incorporate ***all*** records generated by the Department related to an investigation and arrest.
- Prosecutors can apply for Protective Orders to exclude information from discovery that may endanger a witness or victim, such as their name or address.
- Defendants are entitled to receive and review discovery before accepting or rejecting a plea offer. It is anticipated that very few pleas will be accepted at arraignment.
- Failure to turn over all discovery on time *may* result in dismissal of the criminal case.

II. DISCUSSION: Amendments to Criminal Procedure Law

On January 1, 2020, the Criminal Procedure Law will be amended to expedite and expand the discovery process in criminal cases.[1] The new law mandates that all discovery must be turned over to the defense within 15 days of arraignment. The 15 day time period is considered the initial discovery phase. All records, including, but not limited to, all documents, recordings, videos, laboratory testing and notes, that are in the Department's possession during those 15 days must be turned over. After the initial 15 day period, any new records that are created must be turned over as soon as possible. The law also broadens the scope of discovery to include more records and information.

Under the new law, defendants will be entitled to receive and review discovery before accepting a plea offer. This will be a major change from the way pleas have been handled in the

[1] Criminal Procedure Law §§245.10 – 245.85.

past, when the majority of cases pled out at arraignment or shortly thereafter. When that happened, little to no discovery was turned over to the defense. Extensive discovery was only turned over if a case actually proceeded to pre-trial hearings and/or trial.

Once the new law takes effect on January 1, 2020, it is expected that the majority of defendants will wait to receive discovery before considering a plea offer. As a result, discovery will need to be produced immediately following all arrests. The Department bears the burden of transferring all records, evidence, test results, notes, recordings, videos, and photos to the prosecutor as soon as possible after an arrest. Prosecutors will have a very small window of time to review the discovery, make redactions and apply for Protective Orders to exclude sensitive information before they turn the entire discovery packet over to the defense. Prosecutors must be given as much time as possible to perform these tasks. As you will read below, the expansive discovery packets will include sensitive information such as the names of every person who provided the Department with information about an investigation. The major changes to the law are discussed in detail below.

A. Witnesses

i. Lay Witnesses

The names of every person known to have information relevant to the prosecution must be provided to defense counsel within the initial 15 day period. This includes every witness on scene who spoke to a police officer, every 911 caller and any other person who is known to have knowledge about the crime, even if the information is only slightly related to the crime and is not relied upon to establish probable cause. This also includes any person known to have information about a potential defense to the prosecution. Not only do the names have to be turned over, but they must be accompanied by adequate contact information.[2] Addresses are not required. This is a significant change from the way witness names and contact information were handled historically under the discovery laws. Before the enactment of this new law, the prosecution would only provide the names of witnesses who would be testifying at trial to the defense. If the defense sought information about other witnesses, they had to petition the court for that information and the prosecution had the opportunity to object.

In addition to the names and contact information of any potential witnesses, all written or recorded statements made by those individuals must also be provided to defense. Those statements constitute what is commonly referred to as *Rosario* material.[3] *Rosario* material is any writing or recording that memorializes a statement made by a witness regarding the criminal transaction or the subsequent investigation. It includes memorialization of the statement itself or a summary of the statement documented in memo books, notes, police reports, emails, text messages, voicemails, photos, and videos.

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[2] The prosecutors intend for defense attorneys to contact non-law enforcement witnesses through a communication service which will not require them to provide defense counsel with direct phone numbers or email addresses for the witnesses. The defense bar has already made complaints about the communication system and will likely demand information necessary to make direct contact with witnesses.

[3] See LEGAL BUREAU BULLETIN VOLUME 46, No. 1 of 2016 entitled, *The Rosario Rule*.

Arresting officers and lead investigators will be responsible for providing the prosecutor with the names and contact information for every known witness, as well as all *Rosario* material.

ii. Undercover Officers and Confidential Informants

The identities of undercover officers and confidential informants will **not** be turned over during the initial discovery phase. However, prosecutors must notify the defense that an undercover officer's or confidential informant's identifying information was redacted or excluded from the discovery packet.

Arresting officers and lead investigators must immediately alert the prosecutor that a confidential informant or undercover was involved in an investigation so that the prosecutor takes the necessary steps to protect their identity.

iii. Law Enforcement Witnesses

The names of all law enforcement personnel with information relevant to a criminal case, arrest or potential defense must be turned over, along with all *Rosario* material. This means that every writing or recording that memorializes or summarizes a statement made by law enforcement personnel about the criminal investigation or arrest must be turned over as discovery. This includes any and all members of the service who responded to the scene of a crime or participated in an investigation both before and after an arrest, even if an officer's participation in the investigation was minimal. The written or recorded statements will include memo book entries, handwritten notes, Department forms and memos, reports, body-worn camera footage, text messages, voicemails, emails, etc. Arresting officers and lead investigators are responsible for collecting all of the information and material.

The mandate to provide the name of every law enforcement member who has information relevant to a case is a significant change from the way discovery was handled in the past. Traditionally, only the names of law enforcement personnel who would be testifying at trial were turned over during discovery. If defense counsel wanted a more expansive list of names, defense counsel was required to petition the court.

iv. Giglio

The prosecution has always been obligated to provide defense with any information that may impact the credibility of an officer who will testify at trial. This type of information is commonly referred to as *Giglio* material, which includes adverse credibility findings, civil lawsuit history, and disciplinary history.[4] Under the mandates of the new law, prosecutors must provide to the defense *Giglio* information for all officers who have information about an investigation or arrest because they are all potential witnesses. In the past, *Giglio* information was only provided for witnesses who were in fact testifying at hearing or trial. That is no longer possible because prosecutors must provide *Giglio* material to the defense during the initial 15 day period. Prosecutors will not be able to determine which officers will in fact testify at such an early stage

[4] See LEGAL BUREAU BULLETIN VOLUME 47, No. 1 of 2017 entitled, *Cross-Examination of Police Witnesses.*

in the case. The Legal Bureau will be responsible for providing officers' *Giglio* information to prosecutors.

If an officer has information which may impact the credibility of lay witnesses, this information is also considered *Giglio* material and the officer must share it with the prosecutor. This can include inconsistent statements, a relationship between the lay witness and the victim or defendant, or promises made by law enforcement to the lay witness.

B. Grand Jury

The new law includes several changes to discovery associated with the grand jury process. First, when a defendant intends to testify before a grand jury, any statements made by the defendant to law enforcement or a person acting on behalf of law enforcement must be turned over 48 hours before defendant is scheduled to testify in front of the grand jury. The statements which must be turned over include, but are not limited to, those made during the commission of a crime to an undercover officer or a confidential informant. In situations where turning this information over may expose the identity of an undercover officer or confidential informant, the prosecutor may seek a Protective Order to exclude the statements from discovery. Previously, defendants were not entitled to receive statements they made during the commission of a crime to law enforcement or law enforcement representatives unless the case proceeded to pre-trial hearings or trial.

Second, if a defendant is indicted by a grand jury, under the new law the defendant will receive transcripts of all statements made by witnesses to the grand jury. These transcripts must be turned over during the initial 15 day discovery period. Under the old law, the defendant was entitled to only his or her own grand jury transcript during the initial discovery phase. If the case proceeded to pre-trial hearings or trial, only then would the defendant be entitled to other grand jury testimony. The grand jury transcripts that were turned over were limited to witnesses who would be testifying during pre-trial hearing or at trial. The prosecutor is responsible for obtaining the grand jury transcripts and providing them to the defense.

C. Videos and Photographs

All video and photographs in the possession of the Department must be turned over to defense within the initial 15 day period. This includes *all* body-worn camera footage from every member of the service who was present at the scene of a crime or who participated in an investigation both before and after an arrest, all photographs of evidence (including photographs taken on Department Smartphones) and video obtained from surveillance cameras or provided by witnesses. Any video or photo that is obtained after the 15 day period must be turned over as soon as possible. Arresting officers and lead investigators are responsible for collecting this video and providing it to prosecutors.

D. Scientific Testing

The new law requires disclosure of a significantly larger amount of information about scientific testing. In addition to lab reports which provide the final results of scientific tests, the new discovery law requires disclosure of all of the data related to testing, all notes made by analysts and all photos taken of the evidence during the analysis. The analysts who conduct testing will be required to provide a resume, ten years' worth of proficiency exams, any conflicting analyses or results, and any reports of non-conformance with accreditation or lab protocols.

The new law also permits the defense to re-examine or re-test evidence that was analyzed by the Police Lab or the Office of the Chief Medical Examiner ("OCME"). Thus, there is likely to be an uptick in the number of requests by defense experts to do their own testing of drugs and forensics.

The various sections of the lab will provide records to arresting officers, lead investigators and prosecutors in different formats. For example, the Drug Lab will share test results and other paperwork directly with prosecutors through the Laboratory Information Management System ("LIMS"). Other sections of the lab, such as the Crime Scene Unit, will upload discoverable materials to the Enterprise Case Management System ("ECMS") where both the lead investigator and lab personnel will have the ability to share the files with prosecutors through the ECMS sharing portal.

E. Protective Orders

Protective Orders are a critical part of the new discovery process. Prosecutors, police and the public must now rely on the court issuing a Protective Order to exclude information from the discovery packet which may endanger the lives of witnesses or victims. In order to obtain a Protective Order, prosecutors must demonstrate that good cause exists to exclude the information. To determine if good cause exists, courts will look at several factors including danger posed to a witness, risk of intimidation, economic reprisal, bribery, harassment, risk of an adverse effect upon the needs of law enforcement, including the protection of confidential informants, and the nature and severity of the risk. Protective Orders can come in different forms. Some may permit the exclusion of sensitive information from the discovery packet while others may permit the defense attorney to see the information but prohibit the defendant from seeing it.

It is imperative for officers to bring sensitive information to the attention of each prosecutor that they interact with, as soon as possible. Do not assume that a prosecutor has been informed of the safety concerns by other staff in the prosecutor's office. Officers should show prosecutors where the sensitive information is located in the case file, records, paperwork, or videos. For example, if the neighbor of a violent gang member is recorded on BWC providing information about the gang member, investigators should bring that recording to the prosecutor's attention and explain the strong likelihood that the neighbor will be in great danger if a Protective Order is not obtained to exclude the footage from discovery. Arresting officers and investigators must maintain open lines of communication with prosecutors in case the Protective Order is denied by the court. In that situation, the arresting officer or investigator must notify supervisors about the dangers posed to witnesses. An assessment must be made about the ability to keep the witness safe, the

need to relocate the witness or the possibility of abandoning a prosecution in the event that a witness' safety cannot be ensured.

F. Orders to Gain Access

The new reforms allow the defendant to ask the court for an Order to Gain Access which permits the defense to inspect, photograph, or measure a crime scene. When an Order to Gain Access is granted by a court, the condition of the scene must be preserved until the defense completes its inspection. When deciding if such an order should be granted, the court will weigh the negative impact on the defendant if denied access against the needs and privacy of anyone who owns or lives at the location. The prosecution will have the opportunity to oppose the defendant's request to gain access. If access is granted, the people who own, operate or live at the location may request the presence of law enforcement personnel while the defense is conducting their inspection.

G. Penalties for Non-Compliance

The consequences of failing to turn over an item of discovery may be severe. Penalties range from suppression of a particular piece of evidence to dismissal of the case entirely. In addition to the penalties provided in the new discovery law, failure to comply may trigger dismissal based on violations of the defendant's right to a speedy trial.

III. CONCLUSION:

The Department is responsible for gathering all known discoverable items and providing them to the prosecutor immediately after an arrest is made. The responsibility to provide discovery to the prosecutor is ongoing. As new reports or records are created, they must be sent to the prosecutor immediately by arresting officers and lead investigators. Failure to fulfill these responsibilities may result in dismissal of a criminal case.

Any questions regarding the contents of this bulletin may be directed to the Legal Bureau at 646-610-5400, Monday – Friday from 0700 x 2300. At all other times, the on duty attorney is available through Operations at 646-610-5580.